IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION NO. 99-573-06
	:	
v.	:	
	:	
JOHN DUFRESNE	:	CIVIL ACTION NO. 04-7

MEMORANDUM

Baylson, J. **August 10, 2006**

Petitioner-Defendant in this case originally filed a Motion under 28 U.S.C. § 2255 on January 2, 2004 (Doc. No. 296) and pursuant to a January 7, 2004 Order from Judge Herbert J. Hutton (Doc. No. 297), it was refiled with the correct § 2255 form on January 26, 2004 (Doc. No. 298). The government filed its response on February 4, 2004 (Doc. No. 303). On May 17, 2004, Defendant filed a "traverse" to the government's response (Doc. No. 311). Finally, Defendant filed a document entitled "Amendment and Supplemental Pleadings to 28 U.S.C. § 2255" on March 31, 2005 (Doc. No. 333). On April 12, 2004, this case was transferred to the undersigned.

I. Introduction

Defendant was tried before a jury and convicted on a single count of a multi-count indictment, for conspiracy to manufacture, distribute, and possess with intent to distribute methamphetamine, in violation of 28 U.S.C. § 846, together with co-defendant Mark Lanzilotti.[1] Other defendants named in the indictment pleaded guilty, and some of them testified as

[1] Lanzilotti was also charged and convicted in Counts Four and Five of substantive charges of manufacturing methamphetamine. See Trial Tr. at 122–23, Oct. 31, 2000.

government witnesses against Defendants Dufresne and Lanzilotti.

After the jury verdict of guilty on the conspiracy claim, the jury then considered, with separate arguments and instructions, the forfeiture charges, and also whether the government had proved that the quantities involved were more than one kilogram of methamphetamine. The jury then rendered a specific finding, pursuant to instructions requiring proof beyond a reasonable doubt, that Defendant's offense involved more than one kilogram of methamphetamine. Defendant was also found liable for forfeiture of $30,000 in drug proceeds. Trial Tr. at 141–42, Oct. 31, 2000.

On February 20, 2002, Defendant was sentenced to 360 months incarceration, a fine, and other conditions. The Third Circuit affirmed his conviction on January 17, 2003, United States v. Dufresne, 58 Fed. Appx. 890 (3d Cir. 2003), and his Petition for Certiorari was denied by the United States Supreme Court on May 27, 2003. Dufresne v. United States, 538 U.S. 1064 (2003).

In Defendant's § 2255 Motion, he first alleges ineffective assistance of counsel. He contends that his defense counsel was ineffective for improper and insufficient investigation, failure to call and subpoena witnesses, failure to go to the scene of the Defendant's alleged criminal location to locate potential witnesses, and failure to interview witnesses whose names had been supplied by Defendant or to hire an investigator to track down potential witnesses. He alleges that his counsel failed to conduct any pretrial investigation.

Dufresne's Petition also alleges that the government failed to prove his participation in the drug conspiracy beyond a reasonable doubt, that government witnesses were given, offered, or promised something in exchange for their testimony, thus violating 18 U.S.C. § 201(c)(2), that

there was an Apprendi violation pursuant to the fact that the drug amount was not mentioned in the indictment nor was there any mention in the indictment as to whether the type of methamphetamine was powder or liquid, and that the District Court erred in granting the government's request for a money judgment against Defendant for $30,000 pursuant to § 853. Defendant also objects to the "obstruction of justice (perjury) two point enhancement" and alleges that he was entitled to a two-level reduction of sentence pursuant to § 3E1.1 of the United States Sentencing Guidelines for acceptance of responsibility.

The government filed a detailed response on February 17, 2004, which thoroughly reviewed the trial testimony and asserts that the only constitutional claim properly raised in the § 2255 Petition relates to ineffectiveness of counsel. To this claim, the government asserts that the Petitioner does not meet the two standards of Strickland v. Washington, 466 U.S. 668 (1984). Specifically, the government asserts that counsel's performance at trial, viewed objectively, was reasonable, and secondly, that the Defendant cannot show that there was a reasonable possibility that but for counsel's allegedly unprofessional errors, the result of the proceeding would have been different.

In Defendant's "traverse" filed on May 17, 2004, he asserts the District Court committed plain error, and he repeats his allegations of ineffective counsel, arguing that he was prejudiced by his counsel's failure to raise unspecified issues in the direct appeal to the Third Circuit. For apparently the first time, on page four of this pleading, Petitioner makes some specific allegations concerning the failure of his defense counsel to call defense witnesses. On page four, he identifies as potential witnesses two retired Philadelphia Police Officers, John Orr and Anthony Gagleanto, and asserts they "would have testified that the Defendant/Petitioner would have given

names, places to where the Defendant worked, as they also worked with the Defendant." On page five, he repeats these names and asserts "their testimony would have been helpful, and could have assisted in his defense at trial . . . ." Defendant asserts that the remainder of his issues raised in his Petition are cognizable under § 2255 and have not been waived. Defendant also repeats that the government violated the anti-gratuity statute, and that the Court improperly applied the United States Sentencing Guidelines.

Dufresne's Petition is full of legal citations, but sparse on the facts. It appears that none of the above grounds were raised in Dufresne's direct appeal, and the only issues raised as a constitutional claim would be the first, concerning ineffective assistance of counsel, and the Apprendi claim.

II. Discussion

A. Claim of Incompetent Counsel

The Court will first consider Petitioner's claim of incompetent counsel. Although the Third Circuit, on direct appeal, did not consider a claim of incompetent counsel, which must be raised on collateral attack, nonetheless Petitioner did raise on direct appeal a claim that he was the victim of vindictive prosecution and that his Sixth Amendment confrontation right was violated. In rejecting the latter claim, the non-precedential Opinion by Judge McKee states: "Dufresne's counsel aggressively cross examined all of the government's witnesses, argued against their credibility to the jury, and made clear to the jury his theory that the government's evidence was based largely on the testimony of co-conspirators and was insufficient to convict beyond a reasonable doubt. The fact that the jury rejected the defense does not mean that Dufresne's Sixth Amendment confrontation rights were violated." Dufresne, 58 Fed. Appx. at

896.

This Court has reviewed the trial record and finds that Dufresne's trial counsel met the objective standards of competence under Strickland v. Washington. The leading witness against Petitioner was Dennis Virelli ("Virelli"), who had been a leader of the alleged conspiracy, had been convicted of other crimes, pleaded guilty to the current charge, and testified that he had decided to cooperate with the government in order to help himself and secure a lenient sentence. Petitioner's defense counsel vigorously cross examined Virelli (and the other witnesses), pointing out Virelli's extensive criminal record and his obvious motive in testifying to secure a more lenient sentence. Counsel also made objections to the admissibility of testimony. See, e.g., Trial Tr. at 4–13, Oct. 26, 2000.

Although Petitioner claims that defense counsel did not investigate or call any witnesses, the trial record belies this assertion. Kenneth Paul Waryga testified on behalf of Defendant about his carpentry work and also to contradict Virelli about a telephone call that Virelli had testified to between Virelli and Petitioner. Trial Tr. at 59–66, Oct. 30, 2000. In addition, Defendant testified in his own defense. Id. at 66–80.

Petitioner also omits from his § 2255 papers and briefs the fact that his counsel had intended to call two witnesses, Francine and Robert Palladino, who were related to one of the prosecutors. The trial court made a ruling concerning the offer of proof as to these witnesses, but they did not testify. This situation was reviewed by the Third Circuit in the direct appeal in detail.

This Court has reviewed the overall trial testimony, and specifically the cross examination of government witnesses by defense counsel, and the arguments made by defense

counsel on behalf of Petitioner. By the objective standard called for under Strickland v. Washington, Petitioner's claim of ineffective counsel is completely unsupported by the trial record.

Furthermore, the Court has, under the second standard set forth in Strickland, considered whether the defendant can show there was a reasonable possibility, but for the errors which his counsel allegedly made, that the result of the proceeding would have been different. Virelli was a strong witness with a command over the facts, who had been thoroughly prepared by the government and was corroborated by other witnesses. It is therefore highly unlikely that any cross examiner could have been able to demonstrate to the jury that he was totally incredible such that the Defendant would have been acquitted.

The Court also does not find any reason to have an evidentiary hearing on this issue. The Petitioner is not entitled to an evidentiary hearing or any relief on his claim of ineffective counsel. He has not presented any facts suggesting that his counsel did not render competent representation, and there is therefore no miscarriage of justice. Under the standard set forth in United States v. Dawson, 857 F.2d 923 (3d Cir. 1988), and repeated through United States v. McCoy, 410 F.3d 124 (3d Cir. 2005), and United States v. Booth, 432 F.3d 542 (3d Cir. 2004), even though the Court characterizes Petitioner's claims as non-frivolous, the record conclusively shows that Petitioner had competent counsel throughout the trial.

The Court has also reviewed the brief on appeal filed by Petitioner's trial counsel, who also served as his counsel on the direct appeal. The brief is a professional piece of advocacy, concentrating on the District Court's ruling on the proffer of the Palladinos as trial witnesses. Similar to the finding as to the conduct of the trial, the Court finds that Petitioner's counsel on

appeal met an objective standard of competency.

As to Petitioner's belated claims that the former police officers named above would have been helpful witnesses, his proffer is too general. Petitioner only indicates that they could have testified to details of Defendant's work, as they also worked with him. However, Defendant was not charged with any crimes relating to his work, but rather with being a drug dealer.

B. Other Claims by Petitioner

As to the Petitioner's claims under 18 U.S.C. § 201(c)(2), which Petitioner refers to as the anti-gratuity statute, the Third Circuit has rejected this claim. See generally United States v. Hunte, 193 F.3d 173 (3d Cir. 1999), cert. denied 528 U.S. 1128 (2000), rejecting the decision on which Petitioner relies, United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998), rev'd en banc, 165 F.3d 1297 (10th Cir.), cert. denied, 527 U.S. 1024 (1999).

As to Petitioner's claim under Apprendi v. New Jersey, 530 U.S. 466 (2000), which can also be said to present a constitutional claim, the government cites the trial record which indicates that the jury, in fact, did render a specific verdict that Defendant was in possession of more than one kilogram of methamphetamine, and thus the jury did make a factual finding on a fact that warranted the sentence that Petitioner actually received. Thus there is no Apprendi violation. Id. at 491–97.

The Court will not review the other claims made by Petitioner because they are non-constitutional in nature, were not raised on direct appeal, and thus are not properly before this Court on a § 2255 Petition.

In Defendant's supplemental pleadings filed March 31, 2005, Petitioner raises issues under Blakely v. Washington, 542 U.S. 296 (2004) and United States v. Booker, 543 U.S. 220

(2005). However, as Petitioner's sentence was imposed on February 20, 2002, and the United States Supreme Court denied certiorari, thus ending his direct appeal on May 27, 2003, it is clear that Petitioner has no right to a resentencing under Blakely or Booker in that the Third Circuit has squarely held that these decisions are not retroactive and only apply to defendants whose cases were on direct appeal at the time of the decision. See Lloyd v. United States, 407 F.3d 608, 615–16 (3d Cir. 2005) ("Booker does not apply retroactively to initial motions under § 2255 where the judgment was final as of January 12, 2005, the date Booker issued.").

C. Certificate of Appealability

Petitioner also seeks a certificate of appealability in this matter. The Antiterrorism and Effective Death Penalty Act requires that a certificate of appealability be granted before an appeal of the denial of a § 2255 petition may proceed. 28 U.S.C. § 2253(c)(1). A certificate of appealability may issue only if "the applicant has made a substantial showing of the denial of a constitutional right." Id. § 2253(c)(2).

The Third Circuit has held that: (1) the mere allegation of a constitutional wrong does not amount to a "substantial showing of a denial of a constitutional right" to justify an appeal; and (2) a petitioner must make substantial showing of such an error in order to present an appeal. Santana v. United States, 98 F.3d 752, 757 (3d Cir. 1996). The Supreme Court has held that a substantial showing of the denial of a constitutional right includes "showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 483–84 (2000). The Slack Court continued, writing, "Where a district court has rejected the constitutional claims on

the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Id. at 484. As clearly indicated above in the Court's discussion of the issues presented in his § 2255 filing, Petitioner has not made a "substantial showing of a denial of a constitutional right," and the Court will therefore deny the request for a certificate of appealability.

III. Conclusion

For the reasons stated above, Petitioner's requests in the alternative that his conviction be vacated, or that he be granted a new trial, or that his sentence be vacated, will be denied. The Court will also deny Petitioner's request for a certificate of appealability.

An appropriate Order follows.

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ORDER

AND NOW, this 10th day of August, 2006, it is hereby ORDERED that the Petition for Post-Conviction Relief under 28 U.S.C. § 2255 (Doc. No. 298) is DENIED. The Court will deny a certificate of appealability.

BY THE COURT:

s/ Michael M. Baylson
Michael M. Baylson, U.S.D.J.